

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

NATIONAL UNION FIRE INSURANCE)
COMPANY OF PITTSBURGH, PA,)
)
Plaintiff) **Civil Action No. 2:18-mc-00048**
)
v.)
)
SOUTHERN COAL CORPORATION,)
)
Defendant.)

ORDER FOR APPEARANCE AND EXAMINATION

Plaintiff National Union Fire Insurance Company of Pittsburgh, PA (“National Union”) caused a Writ of Execution to issue against judgment debtor Southern Coal Corporation (“Southern Coal”) by the Clerk of this Court on July 9, 2018. “The procedure on execution – and in proceedings supplementary to and in aid of judgment or execution – must accord with the procedure of the state where the court is located” Fed. R. Civ. Proc. 69(a).

Under West Virginia law, a judgment creditor is entitled to “institute interrogatory proceedings before a ‘commissioner in chancery’ . . . to enforce an existing judgment.” *U.S. Foodservice, Inc. v. Donahue*, No. 3:10-CV-00183, 2010 WL 5067939, at *1 (S.D.W. Va. Dec. 3, 2010).

More precisely, W. Va. Code § 38-5-1 provides that:

upon application of the execution creditor, the clerk of the court from which the execution issued . . . shall issue a summons against the execution debtor, or any officer of a corporation execution debtor having an office in this State . . . requiring the execution debtor to appear before a commissioner in chancery of the county from which the summons issued . . . to answer upon oath such questions as shall be propounded at such time and place by counsel for the execution creditor, or by the commissioner.

Because “there is no ‘commissioner’ in the federal judicial system, federal courts have ruled that a magistrate judge may serve in that role for purposes of conducting proceedings in aid of execution under West Virginia Code § 38–5–1.” *U.S. Foodservice, Inc. v. Donahue*, No. 3:10-cv-183, 2010 WL 5067939, at *1 (S.D.W. Va. Dec. 3, 2010); *see also Chicago Pneumatic Tool Co. v. Stonestreet*, 107 F.R.D. 674 (S.D.W. Va. 1985); *Byron Originals, Inc. v. Iron Bay Model Co.*, No. 5:05-cv-82, 2006 WL 1004827, at *1 (N.D.W. Va. Apr. 12, 2006). Magistrate judges in this district have frequently been appointed to preside over proceedings in aid of execution, as part of the need to “modif[y] state procedure to conform with federal practice.” *Clark v. Wilbur*, 913 F. Supp. 463, 468 (S.D.W. Va. 1996), *aff’d sub nom. Clark v. Allen*, 139 F.3d 888 (4th Cir. 1998).

The parties are notified that an examination of Southern Coal in aid of execution will commence on the 2nd day of August, 2019, at 11:00 a.m., at the Robert C. Byrd United States Courthouse, 300 Virginia Street, East, Room 5400, Charleston, West Virginia. The examination will be conducted by counsel for National Union, with the participation of the United States Magistrate Judge acting as Special Commissioner. One or more representatives of the judgment debtor Southern Coal are hereby Ordered to appear at the date and time specified herein to testify under oath and furnish information to aid in enforcement of the money judgment or to answer concerning property or debt. It is the duty of Southern Coal to designate one or more of the following to appear and be examined: officers, directors, managing agents, or other persons who are familiar with the property and debts of Southern Coal. The deposition shall be taken before a Certified Shorthand Reporter or other qualified notary.

It is FURTHER ORDERED that the issuance of a summons to Southern Coal to appear at the aforementioned date and time shall be served on counsel of record for Southern Coal. Southern Coal shall answer upon oath such questions as shall be propounded by counsel for National Union,

or by the said Magistrate, and to convey or assign to the United States Marshal for the Southern District of West Virginia such money, bank notes, securities, evidences of debt, other personal property, choses in action or other intangible personal property as may be ordered for the enforcement and payment of the judgment, including interest and costs, outstanding in the above matter.

The Clerk is directed to transmit a copy of this Order to counsel of record.

ENTER: June _____, 2019

Dwane L. Tinsley
United States Magistrate Judge

Submitted by:

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